OCT 10 1958
..., Clerk

Supreme Court of the United States

October Term, 1958

No. 358

DE FLORE CONSTRUCTION COMPANY Inc., J. B. COOPER and MANUFACTURERS CASUALTY INSURANCE COMPANY,

Petitioners,

against

THE CITY OF MIAMI, for the use and benefit of COMPLETE MACHINERY AND EQUIPMENT COMPANY INC.,

Respondent.

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

SIDNEY O. RAPHAEL,
Attorney for Petitioners
18 East 41st Street
New York 17, New York

Supreme Court of the United States

October Term, 1958

No.

DE FONTE CONSTRUCTION COMPANY INC., J. B. COOPER and MANUFACTURERS CASUALTY INSURANCE COMPANY,

Petitioners,

—against—

THE CITY OF MIAMI, for the use and benefit of COMPLETE MACHINERY AND EQUIPMENT COMPANY INC.,

Respondent.

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Statement

The contentions raised by the respondent in opposition to the writ of certiorari have been answered in the petition for said writ, except with respect to the contentions raised under Point I in the respondent's brief. This reply brief will therefore be limited in answering said Point.

POINT I

The respondent is in error in urging that the jurisdiction of neither this Court nor the Court of Appeals has been invoked with regard to the judgment rendered in petitioner's favor, and further errs in contending that said judgment is therefore final and cannot be attacked or disturbed.

As the record will disclose, the appeal is from a final judgment entered on December 27th, 1956 in the sum of $94,957.45; which takes into consideration the two separate verdicts rendered by the jury in favor of the petitioners and the respondent respectively. We suggest that the notice of appeal (R. 184-185) appropriately brings up for review all of the contentions urged in our brief.

At the time of the service of our notice of appeal, the respondent had already served its own notice of appeal with respect to our judgment, and we were intending to argue the full case before the court. The subsequent withdrawal by the respondent of its said notice of appeal should not, we submit, prejudice the rights of the respondent and disentitle it from a full review of the questions submitted to this court.

In *Commercial National Bank in Shreveport* v. *Parsons*, 144 F. 2d 231 (5th Cir.), at page 241, the court said:

> "The mere fact that filing a notice of appeal has been substituted for other methods of invoking the jurisdiction of a circuit court of appeals has not obliterated pre-existing distinctions in the scope of the review between appeals and writs of errors. Upon such writs, no error in law could be reviewed

that did not appear upon the record or unless made a part of the record by bill of exceptions; but an appeal, which *was derived from the civil law, reopened the whole case*, subjecting the law and the facts to a review and retrial.

"In the case at bar, without a cross-appeal, the appellee might have urged in support of the judgment in its behalf that usurious interest erroneously allowed appellant by the court below equalled or exceed the amount of all items comprising said judgment. This course was approved and the additional grounds examined in United States v. American Ry. Express Co., 265 U. S. 425, page 435, 44 S. Ct. 560, 564; 68 L. Ed. 1087, wherein the Supreme Court said: 'But it is likewise settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it. By the claims now in question, the American does not attack, in any respect, the decree entered below. It merely asserts additional grounds why the decree should be affirmed. These grounds will be examined.'" (Italics ours.)

It is significant to note that in this case in the dissenting opinion by Judge Waller, he urged on the authority of *Arkansas Fuel Oil Co.* v. *Leisk*, 133 F. 2d 79 (5th Cir.), a contrary ruling. Nevertheless, the majority opinion of the Fifth Circuit was to the contrary, as above set forth.

Courts are liberal in construing the sufficiency of notices of appeal. *Martin* v. *Clark*, 105 F. 2d 685 (7th Cir.), Accord: *Long* v. *Union Pac. R. Co.*, 206 F. 2d 829 (10th Cir.).

The notice of appeal must be considered in connection with the statement of points relied on. *Sun-Lite Awning Corp. v. E. J. Conklin Aviation Corp.*, 176 F. 2d 344 (4th Cir.).

CONCLUSION

For the reasons set forth in the petition for writ of certiorari, and in this reply brief, it is respectfully submitted that the petition for a writ of certiorari herein should be granted.

Respectfully submitted,

SIDNEY O. RAPHAEL
Attorney for Petitioners
18 East 41st Street
New York 17, New York